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Restraint of Trade--Monopoly--Actual Exclusion of Competition (American Tobacco Co. v. United States, 90 L.Ed. 1095 (1946))

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The dissenting opinion argued that the parties had not provided in their contract that Section 240-a should not be operative and the contract thereby came within the purview of the statute. Further, since the statute does not provide for specific performance with an abatement where the loss is material, the defendant was correct in tendering the down payment plus the cost of title search.

The dissent, it would seem, is too narrow an interpretation since it would prevent the purchaser from obtaining the specific *res* for which he bargained. Historically, in an action by the vendee for specific performance, equity is more liberal in exercising jurisdiction.⁸ There is greater reason for affording aid of the court to the purchaser who seeks specific execution of the agreement and who is desirous of taking the part which the vendor can convey.⁹ The purchaser can require specific performance with abatement even though the damage or defect is material.¹⁰ Clearly, the statute does not intend to deny the vendee a right so well rooted in the law and so equitable in result.

J. V.

RESTRAINT OF TRADE—MONOPOLY—ACTUAL EXCLUSION OF COMPETITION.—The petitioners, American Tobacco Company, Liggett & Myers Tobacco Company and R. J. Reynolds Tobacco Company,¹ dominate the national domestic cigarette production with a substantial monopoly amounting to over two-thirds of the entire domestic field of all cigarettes, the opposition being confined to six small competitors. The evidence tends to show that the petitioners conspired to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes and to exclude undesired competition against them in the purchase of leaf tobacco. It also appears to have been a conspiracy to fix and control prices and other material conditions relating to the distribution and sale of cigarettes and to exclude undesired competition. All these practices tended to keep them in their dominant position and demonstrate a power and intent on their part to exclude competition. The trial court charged the jury that "... the term '*monopolize*' as used in Section 2 of the Sherman Act,² as well as in the last three counts of the Information,

⁸ *Waters v. Travis*, 9 Johns. 450, 464 (N. Y. 1812).

⁹ *See Erwin v. Myers*, 46 Pa. 96, 106 (1863).

¹⁰ 5 POMEROY, EQUITY JURISPRUDENCE (2d ed. 1919) § 2256.

¹ Hereinafter referred to as American, Liggett and Reynolds, and "Big Three."

² "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall

means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the *power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power. . . . An essential element of the illegal monopoly or monopolization charged in this case is the existence of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent.* Thus you will see that an *indispensable ingredient of each of the offenses charged in the Information is a combination or conspiracy.*"³ (Italics are the court's.) American, Liggett, Reynolds, American Suppliers, Inc., a subsidiary of American, and certain officials of the respective companies were convicted by a jury in the U. S. District Court for the Eastern District of Kentucky, of violation of Sections 1 and 2 of the Sherman Anti-trust Act⁴ on four counts: (1) Conspiracy in restraint of trade, (2) Monopolization, (3) Attempt to monopolize, and (4) Conspiracy to monopolize. The third count was held merged in the second. The Circuit Court of Appeals for the Sixth Circuit affirmed each conviction.⁵ On petition for certiorari the Supreme Court considered all grounds for review of these judgments and granted the petitions but limited each to the question ". . . whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act."⁶ Petitioners argue that Section 2 of the Sherman Act should be interpreted to require proof of actual exclusion of competitors in order to show "monopolization," and they claim that only thus can a "conspiracy to monopolize" trade be sufficiently differentiated from a "conspiracy in restraint of" trade as to avoid subjecting the parties accused under those counts to double jeopardy, or to a multiplicity of punishment in a single proceeding, therefore violating the Fifth Amendment to the Federal Constitution. *Held*, affirmed. Actual exclusion of competitors is not necessary to the crime of monopolization. ". . . [It is] the crime of monopolizing, under Section 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent

be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 STAT. 209 (1890), 15 U. S. C. § 2 (1940).

³ American Tobacco Co. v. United States, — U. S. —, 90 L. ed. 1095, 1098 (1946).

⁴ 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1940).

⁵ 147 F. (2d) 93 (1944).

⁶ 324 U. S. 836, 89 L. ed. 1400 (1945).

and purpose to exercise that power.”⁷ The offenses of conspiracy in restraint of trade and conspiracy to monopolize trade, made punishable under Sections 1 and 2 respectively of the Sherman Antitrust Act, are reciprocally distinguishable from and independent of each other, although the objects of the conspiracies may partially overlap. *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095 (1946).

The court distinguishes between this case and those cited by petitioners⁸ as authority for their contention that unless Section 2 of the Sherman Act be interpreted to require proof of actual exclusion of competitors in order to show “monopolization,” petitioners will be subjected to double jeopardy because there is but one conspiracy, namely a conspiracy to fix prices. “In contrast to the single conspiracy described in . . . [the *Braverman*⁹] case in separate counts, . . . all charged under the general conspiracy statute,¹⁰ . . . we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act.”¹¹ The court continues: “We believe also that in accordance with the *Blockburger* case,¹² §§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracy may partially overlap.¹³ . . . In the present cases, the court below has found that there was more than sufficient evidence to establish a conspiracy in restraint of trade by price fixing and other means, and also a conspiracy to monopolize trade with the power and intent to exclude actual and potential competitors from at least a part of the tobacco industry.”¹⁴

In answer to petitioners’ suggestion that the second count (to monopolize), and the fourth count (to conspire to monopolize), may lead to multiple punishment since the Government’s theory of monopolization calls for proof of a joint enterprise with power and intent to exclude competitors and, therefore, that the conspiracy to monopolize must be a part of that proof, the court states that it has long been settled that a “conspiracy to commit a crime is a different

⁷ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1110 (1946).

⁸ *Braverman v. United States*, 317 U. S. 49, 87 L. ed. 23 (1942); *Blockburger v. United States*, 284 U. S. 299, 76 L. ed. 306 (1932).

⁹ *Braverman v. United States*, 317 U. S. 49, 87 L. ed. 23 (1942).

¹⁰ 35 STAT. 1096 (1909), 18 U. S. C. § 88 (1940).

¹¹ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1099 (1946).

¹² *Blockburger v. United States*, 284 U. S. 299, 76 L. ed. 306 (1932).

¹³ See *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 226, 84 L. ed. 1129, 1170 (1940).

¹⁴ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1099 (1946).

offense from the crime that is the object of the conspiracy. . . .¹⁵ Petitioners, for example, might have been convicted of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, *i.e.*, to exclude actual and potential competitors from the cigarette field.”¹⁶ The court also points out that to support the verdict it was not necessary to show power and intent to exclude *all* competitors, or to show a conspiracy to exclude *all* competitors. All that is required is that the offenders shall “monopolize any part of the trade or commerce among the several states, or with foreign nations.” It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is unimportant whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. “Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.”¹⁷

The Government failed to discover any written or express agreement among American, Liggett, and Reynolds to commit the acts for which they were convicted but did show sufficient practices from which could be spelled out the unlawful conspiracy. As the court points out, “No formal agreement is necessary to constitute an unlawful conspiracy. . . . Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. . . .¹² Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.”¹⁹

The material consideration in determining whether or not a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.²⁰ The court cites

¹⁵ See *United States v. Rabinowich*, 238 U. S. 78, 85, 59 L. ed. 1211, 1213 (1915).

¹⁶ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1100 (1946).

¹⁷ *Id.* at 1110.

¹⁸ *United States v. Schraeder's Son Inc.*, 252 U. S. 85, 64 L. ed. 471 (1920).

¹⁹ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1110 (1946).

²⁰ *United States v. American Tobacco Co.*, 164 Fed. 700, 721 (C. C. S. D. N. Y. 1908), *remanded for further proceedings*, 221 U. S. 106, 55 L. ed. 663 (1911).

with approval *United States v. Aluminum Co. of America*.²¹ In that case the court says: "Indeed it would be absurd to condemn such [price fixing] contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers; they are really partial monopolies. . . . So far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. . . . [Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent. In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." ²²

The proof of monopolization by American, Liggett, and Reynolds depends upon their dominance and control over purchases of the raw material and over the sale of the finished product in the form of cigarettes. In each of the years 1937, 1938 and 1939, American, Liggett, and Reynolds expended a total of over \$40,000,000 a year for advertising, there being a very close relationship between their large expenditures for national advertising of cigarettes and resulting volumes of sales. It would be exceedingly difficult for new firms to enter into competition with them without sufficient capital for advertising on such a large scale. In addition, the "Big Three's" consistent pattern of conduct indicates a close relationship between them and concert of action. In the words of the court: "A friendly relationship within such a long established industry is, in itself, not only natural but commendable and beneficial, as long as it does not breed illegal activities. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders." ²³

The enforcement of the Sherman Act has on occasion been criticized in some quarters for blocking "normal growth and expansion in industry," or condemning size *per se*. In this case it was found

²¹ 148 F. (2d) 416 (1946).

²² *United States v. Aluminum Co. of America*, 148 F. (2d) 416, 427 (1946).

²³ *American Tobacco Co. v. United States*, — U. S. —, 90 L. ed. 1095, 1102 (1946).

that their comparative size on such a great scale inevitably increased the power of American, Liggett, and Reynolds to dominate all phases of their industry. As said by the court in *United States v. Swift & Co.*:²⁴ "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

The decision in this case is another landmark in the fight to attain and maintain a truly free and competitive economy. The growth of America can be attributed to a large extent to our competitive system. The fact that "prevention" is better than "cure" is well known. It is far better to keep industry open for competition than to wait until there has been an actual case of exclusion, with resultant damage to the individual excluded as well as to the nation as a whole.

J. E. Y.

TORTS—WRONGFUL DEATH—DEATH OF DEFENDANT—ABATEMENT AND REVIVAL.—In December 1943, Ephrem Mounsey killed Dr. Verne Hunt by deliberately shooting him with a revolver. Mounsey thereafter took his own life. Surviving Dr. Hunt were the plaintiffs, who are his widow and three minor children. They filed a claim against Mounsey's estate for \$150,000 for "waste and destruction of their property rights," which was rejected.¹ This action is an appeal by the plaintiffs from the judgment dismissing their cause of action after the defendant's demurrer thereto had been sustained. *Held*, reversed, claim allowed. *Hunt v. Authier*, — Cal. —, 169 P. (2d) 913 (1946).

At common law, all actions or causes *ex delicto* died with the person by whom or to whom the wrong was done,² with the possible exception of the survival to the injured person's estate in cases of asportation of and damage to chattels, and against the tort-feasor's estate for wrongs whereby the latter was benefited.³ Upon the death of the victim, Dr. Hunt, a cause of action for wrongful death arose on behalf of the widow and children under the wrongful death statute and continued to exist until the tort-feasor's death.⁴ This action was not brought under the wrongful death statute as such action has been held to abate upon the death of the tort-feasor.⁵ However, another section of the code provided that "any person, or the personal repre-

²⁴ 286 U. S. 106, 116, 76 L. ed. 999, 1006 (1932).

¹ *Hunt v. Authier*, 161 P. (2d) 487 (1945).

² *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

³ (1330) 4 Edw. III, c. 7; (1351) 25 Edw. III, c. 5.

⁴ CAL. CODE CIV. PROC. § 377.

⁵ *Clark v. Goodwin*, 170 Cal. 527, 150 Pac. 357 (1915).